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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 10 1992

RM - 7986 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter Of:)

Request for Amendment of the)
Commission's Rules and Regulations)
Concerning Shared Use of 900 MHz)
Paging Frequencies)

**COMMENTS OF MOBILE TELECOMMUNICATION
TECHNOLOGIES CORPORATION IN OPPOSITION**

Richard E. Wiley
R. Michael Senkowski
Eric W. DeSilva
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Dated: June 10, 1992

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Mobile Telecommunication Technologies Corporation ("Mtel"), by its attorneys, herewith submits its comments concerning the above captioned proposal filed by the Association for Private Carrier Paging Section of the National Association of Business and Education Radio, Inc. ("NABER") to establish frequency protection for 900 MHz Private Carrier Paging licensees ("PCPs"). In order to assist the Commission, Mtel has set forth below (1) a review of the practical consequences of NABER's "transmitter-based" plan for establishing exclusive frequency rights; (2) an update on pending Commission proceedings that could allow use of 930 - 931 MHz band for national and regional systems without engendering the problems inherent in NABER's plan; and (3) a discussion of the legal and public policy issues associated with the functional convergence of disparately regulated PCP and RCC services.

I. SUMMARY

On November 12, 1991, the Private Radio Bureau announced a "freeze" on the acceptance of 900 MHz PCP applications. This action was widely interpreted as the first step in exploring an orderly progression from shared use of spectrum to exclusive frequency rights for 900 MHz PCPs. NABER and others, however, sought and received a lifting of the freeze to permit the continued acceptance and processing of new 900 MHz applications.

NABER now comes forward several months and many applications later with its own petition to establish frequency protection for 900 MHz licensees. Its proposal would create exclusive Local and Regional Systems based upon the number of transmitters held in a market or a contiguous twelve state area, respectively. In addition, a PCP with 300 or more licensed transmitters on any given frequency would immediately obtain exclusive rights to use the frequency throughout the entire country.

NABER does not provide any analysis of the effects of its proposals on existing or future PCP operations. However, an assessment of the proposal based upon publicly available data leads to the following observations:

- Under NABER's National System proposal, (1) six of the forty 900 MHz channels would immediately be set aside for exclusive use by four PCPs, and (2) all of the remaining thirty-four frequencies could later be converted to National Systems.

- NABER does not reconcile its National System plan with the need to insure spectrum availability for (1) migration of lower band systems to 900 MHz; (2) expansion or growth of existing facilities on frequencies converted to National Systems; or, (3) non-PCP private system uses.
- NABER does not address numerous opportunities for warehousing, speculation and other abuses likely to result from its National System proposal to bestow exclusive frequency rights on PCPs for markets they do not now and may never ultimately serve.
- No orderly process is proposed to allow competing PCPs a fair start to achieve protected status - some would be just starting the race that others would have already finished.

NABER's efforts to graft nationwide exclusive rights on an established industry is particularly ill-timed and misdirected given the promising potential of 930 - 931 MHz for accommodating such needs. Mtel, along with numerous PCPs and RCCs, has strongly advocated the prompt release of the 930 - 931 MHz Advanced Technology Paging reserve allocation for new nationwide and regional systems. The prospects for near term access to this spectrum are quite promising as the Commission established June 1, 1992 as the cut off date for new proposals, the comment deadline for petitions for rulemaking and the cut off for technical feasibility demonstrations. This spectrum could promptly support numerous new competing PCP and/or RCC systems across the country.

Finally, the NABER proposal raises a renewed need for the Commission to take an integrated look at the legal and

public policy considerations applicable to RCCs and PCPs. The proposal would eliminate one of the few remaining functional differences between PCPs and RCCs. However, RCCs would labor under significant marketplace disadvantages in competing with PCPs due solely to the regulatory disparities. The Commission must clearly and comprehensively address problems associated with its traditional bifurcated approach to mobile services as well as the renewed controversies arising under Section 332 of the Communications Act if NABER's plan is pursued.

II. AN ANALYSIS OF NABER'S PROPOSAL AND ITS EFFECTS ON EXISTING AND FUTURE PCPs.

NABER's petition for rulemaking proposes new exclusive licensing policies for Local, Regional and National Systems. In each case, the proposal ties the conversion from shared to exclusive frequency rights to the number of transmitters a PCP has deployed. While Local and Regional System rights would be limited to markets where a PCP actually operates, the National System proposal goes one step further to establish exclusive spectrum rights throughout the entire country for any PCP operating 300 or more transmitters on a given frequency.

Notwithstanding the significant implications of the proposal, NABER does not address its immediate or long term

implications. A review of publicly available information, however, suggests the following effects.

A. Immediate and Future Conversion of 900 MHz Systems to National System

NABER's National System proposal would immediately convert at least six of the forty 900 MHz PCP channels into exclusive grants to a few established carriers. Specifically, the transmitter-based standard would set aside national spectrum rights to the following carriers:

- Page Net would have exclusive rights to three frequencies (929.2875 MHz and 929.5625 MHz).
- Pagemart would have exclusive rights to two frequencies (929.6625 MHz and 929.7125 MHz).
- PacTel Paging would have exclusive rights to one frequency (929.9375).
- Metagram America would have exclusive rights to one frequency (929.9875).

The National Systems accruing to Page Net wouldd be the product of applications processed subsequent to the freeze.

The National System Proposal is certain to lead to conversion of additional 900 MHz PCP frequencies into exclusive National Systems. Through new applications, new entrants or merger of existing licensee interests, one can reasonably anticipate a significant movement to obtain national rights. The proposal, however, does not limit or address the potential effects of large scale conversion of frequencies into exclusive national grants.

B. National System Effects on Other Uses of
900 MHz Frequencies

NABER's petition does not provide any procedures to insure spectrum availability for (1) migration of service providers from congested low bands; (2) expansion of growth of existing PCPs licensed on frequencies converted to National Systems for other carriers; or (3) non-PCP private radio uses. The failure to address loss of spectrum for such uses is a glaring omission. The potential adverse implications are quite significant.

Despite its stated goal of encouraging below 800 MHz licensees to change out their systems to utilize 900 MHz spectrum, NABER never explains how this objective can be reconciled with the likely loss of many frequency opportunities to National Systems. No provision in its plan would limit conversions to national systems. No provision in its plan affirmatively rewards or encourages low band licensee relocation to 900 MHz channels. And no provision in its plan explains why lower band licensees might move to frequencies where their future growth or expansion might be blocked through subsequent conversion to National System status.

Similarly, NABER discounts, but never explains, the potentially adverse consequences of the freeze imposed upon licensees already operating on frequencies converted to

National Systems for the benefit of another carrier in another part of the country. At least twelve licensees would have operations frozen in this move. While the initial number is modest, future national system rights will impact on an ever increasing number of established PCPs.

Finally, the erosion of spectrum opportunities for purely private operations is recognized by NABER, but no assurances are offered that such users will continue to have spectrum available in the future. In fact, two of the six frequencies immediately obtaining national system PCP status are on non-PCP channels. NABER appears to be informally creating de facto exclusivity rights in this fashion.

C. Warehousing, Speculation and Other Abuses

NABER does not adequately anticipate likely warehousing, speculation and other abuses arising from its transmitter-based standard. In the interest of simplicity of administration, the petition does not require any loading or spectrum need showings. Nor are there are geographic coverage requirements for its National System proposal. Nothing more is needed than 300 transmitters - even if constructed in limited geographic areas with no customers being served.

NABER's remedy is that transmitters must have a minimum output of 100 watts, simulcast capability and be part of a

functioning paging system. However, these factors hardly constitute an effective deterrent to warehousing and speculative abuses. This is particularly true given the fact that a National System licensee would get exclusive rights for the country with no obligations to ever serve any or all of the markets outside of its initial 300 transmitter site service areas.

D. Lack of Orderly and Fair Process

Finally, NABER's proposal does not provide an orderly process ensuring fair opportunities for all interested parties to participate equally under new PCP licensing standards to obtain PCP exclusivity rights. Its proposal seems designed for the needs of a favored few of its members and the removal of the freeze has complicated rather than alleviated fairness concerns. In essence, NABER is proposing a race in which several of its members have already crossed the finish line and many others have received a prohibitively long head start.

III. NABER'S PETITION IGNORES THE SUBSTANTIAL NATIONWIDE AND REGIONAL SPECTRUM AT 930-931 MHz

One of NABER's proffered reasons for requesting regional and national exclusivity is to "promote the continued growth

and expansion of wide-area, regional 900 MHz PCP systems."¹ NABER, however, omits any mention of the ongoing 930-931 MHz AMS proceeding that could offer unprecedented nationwide and regional opportunities to PCPs. At this time, fourteen separate 930-931 MHz service proposals -- all of which include nationwide and regional systems -- have been tendered for the Commission's consideration, including many proposals filed by PCPs.² In light of these substantial emerging spectrum opportunities, Mtel believes that the costs and dislocation effects of granting NABER's petition -- particularly with respect to the National System proposal -- are excessive.

The interest in the 930-931 MHz band was precipitated by the January 23, 1991 Telocator Petition for Rulemaking requesting the allocation of the advanced technology paging reserve band for AMS.³ This proceeding has now progressed substantially, and, with the Commission's recent actions soliciting comment on existing proposals and cutting off new

¹ NABER Petition at iii, 8.

² Mtel's original Nationwide Wireless Network filing, in fact, included a provision that would allow a carrier to self-designate its regulatory status during the licensing phase.

³ See Petitions for Rulemaking Filed, *Public Notice*, Report No. 1836 (February 7, 1991); *Telocator Petition for Rulemaking to Amend Part 22 of the Commission's Rules Concerning the Use of 930-931 MHz for an Advanced Messaging Service*, RM-7617 (filed January 23, 1991).

pioneer preference requests,⁴ the procedural foundation has been laid for the Commission to issue a Notice of Proposed Rulemaking to release the reserve band.

The proposals that have been tendered for the AMS band are widely varied and include a range of opportunities for PCPs. Mtel, for example, requested an allocation of 150 kHz for three nationwide wireless network ("NWN") service providers. NWN will permit high-speed two-way transmission of digital data between small portable computers and computers on the landline network, as well as other portable computers, using a single 50 kHz channel in simplex mode to provide two-way operations. NWN will employ high-power enhanced multitone modulation simulcast techniques to achieve base-to-mobile throughput rates up to 24,000 bits per second. Mobile-to-base transmissions, in contrast, are low-powered, and use an intelligent scheduling system to provide considerable overall throughput for the return channel. Under the rules Mtel has proposed, NWN carriers would be permitted to offer their services on either a private or common carrier basis.

⁴ See Petitions for Rulemaking Filed, *Public Notice*, Mimeo No. 22914 (April 30, 1992) (soliciting comment on 930-931 MHz petitions); Requests for Pioneer's Preferences Filed, *Public Notice*, Mimeo 22915 (April 30, 1992) (soliciting comments on pioneer's preferences); Deadline To File Pioneer's Preference Requests 900 MHz Narrowband Data and Paging Service (ET Docket No. 92-100), *Public Notice*, Mimeo 22922 (April 30, 1992) (establishing June 1, 1992, cut-off for 930-931 MHz pioneer's preference requests).

The Commission has also received numerous other proposals for new services focusing on different aspects of the marketplace. These include:

- **Acknowledgement Paging Service.** Dial Page, Inc. ("Dial Page") has requested allocation of 75 kHz to permit three operators to provide regional Acknowledgement Paging Service ("APS"). APS will allow a pager user to immediately acknowledge receipt of a page.
- **Advanced Architecture Paging.** PacTel Paging, Inc. ("PacTel") has petitioned the Commission to allocate all 930-931 MHz spectrum unused by AMS for regional Advanced Architecture Paging ("AAP") services. AAP offers an unformatted digital data stream on either 25 or 50 kHz channels suitable for a number of applications.
- **Enhanced Narrow Band Data and Paging Service.** Global Enhanced Messaging Venture proposes an allocation of three channels for a nationwide paging service and three channels for a regional paging service combining a data transmission speed in excess of 6,000 bps with new techniques to increase efficiency of delivering alphanumeric data.
- **Enhanced Paging Service.** Freeman Engineering proposes a new wide band paging service which allows the integration of multiple modes of operation on a single paging channel to provide tone plus voice, tone only, digital readout, alphanumeric and electronic mail services.
- **Ground-to-Air Paging.** PacTel also has requested the Commission to allocate three 25 kHz channels for regional Ground-to-Air Paging ("GAP") services. GAP is intended to extend the benefits of conventional paging to subscribers in transit on airplanes.
- **Hybrid Data Network with Acknowledgement Paging.** Metriplex, Inc. proposes a national system combining the features of a high-speed, one way data and paging service with the functions of an acknowledgement paging system.

- **Mobile Data Radio Service.** Echo Group, L.P. ("Echo") has proposed a Mobile Data Radio Service ("MDRS") that will allow the two-way exchange of digital data among laptops, notebook computers, and fixed computers. Echo has requested allocation of 300 kHz for 6 nationwide MDRS providers.⁵
- **Personal Information Messaging Service.** PageMart, Inc. ("Pagemart") has requested an allocation of 800 kHz to allow two nationwide and two local providers to offer Personal Information Messaging Services ("PIMS"). PIMS would allow real-time two-way communications between mobiles and the landline network.
- **Personal Network Access Communications.** NAC, Inc. ("NAC") has proposed to use 250 kHz in the 901-902, 930-931, or 940-941 MHz bands to provide a Personal Network Access Communications Service ("P*NAC"). P*NAC will provide person-to-person signaling while using the existing telecommunications networks for voice communication.⁶
- **Public Facsimile Broadcast Service.** Edwards/Montauk Telecommunications Co. ("Montauk") has proposed a Public Facsimile Broadcast Service ("PFBS"), requesting one local and two nationwide 25 kHz channels for PFBS operations.⁷

⁵ See Petitions for Rulemaking Filed, Public Notice, Rpt No. 1858 (August 26, 1991); *Echo Group, L.P. Petition for Rulemaking to Amend Section 2.106 of the Commission's Rules to Create a New Mobile Data Radio Service ("MRDS") in the 930-931 MHz Band*, RM-7782 (filed July 30, 1991).

⁶ See Pioneer's Preference Requests Accepted in GEN Docket 90-314 (November 27, 1991); *Request by NAC, Inc. For Grant of a Pioneer's Preference for its Personal Communications Service*, PP-14 (filed July 30, 1991).

⁷ See Petitions for Rulemaking Filed, Public Notice, Rpt. No. 1853 (July 19, 1991); *FAX-MAX Services Co. Petition for Rulemaking for Creation of a New Radio Service "Public Facsimile Broadcast Service" and Allocation of Spectrum Therefor*, RM-7760 (filed May 22, 1991) ["Montauk PFBS Petition"]. Edwards/Montauk Telecommunications, Inc. was previously known as "FAX-MAX Services Co.").

- **Telepoint Management Radio.** Skycell Corporation proposes allocation of a 25 kHz channel to synchronize the transmissions of Telepoint base stations and handsets in a given area.
- **Verified Information Paging Service.** Mobile Communications Corporation of America has proposed a high speed simulcast wireless transmission network to provide faster data rates and longer messages than traditional paging services.
- **VoiceNow Services.** Paging Network, Inc. proposes a service which alerts subscribers that a voice message has been received and stores the message in the pager to provide subscribers the ability to listen to their voice pages when they want.

Importantly, these proposals request spectrum in a band that is not currently licensed and in use. NABER's proposal, in contrast, proposes to graft an exclusivity arrangement on licensed, shared frequencies in order to offer wide area opportunities to PCPs. As discussed above, imposing exclusivity constructs on existing paging systems involves fundamental obstacles and issues avoided in new spectrum allocations. By pressing for opportunities in the 930-931 MHz band, the Commission could avoid these costs and dislocation effects and design an exclusive licensing regime from the ground up, allowing all interested parties equivalent opportunities to participate on a level playing field.

IV. NABER'S PETITION HIGHLIGHTS THE NEED FOR A COMPREHENSIVE AND INTEGRATED EVALUATION OF PCP AND RCC REGULATION

NABER's petition requests elimination of the only remaining functional distinction between PCPs and RCCs -- channel exclusivity -- without recognizing the significance of such a substantial change in policy.⁸ The singular importance of exclusivity as a defining characteristic of PCPs was noted by the D.C. Circuit, which observed that the FCC has approved private land arrangements "similar in many respects to common carrier licensing," but stated that "[u]nlike in the common carrier service, private radio service frequencies are generally nonexclusive and have no guarantee of protection from interference."⁹ By failing to acknowledge the broad change in policy implicated by its petition, NABER has ignored a wide range of legal, procedural, and substantive effects.

⁸ NABER will undoubtedly argue that other functional distinctions exist between PCPs and RCCs, such as end user eligibility and interconnection rights. PCPs operating in the 929 MHz band, however, can serve any user, other than individuals, eligible for licensing under any subpart of Part 90, as well as federal government users. Furthermore, even though RCCs are considered "co-carriers" for purposes of interconnection, in many cases PCPs obtain the same rates, terms, and conditions of interconnection. *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 Rad. Reg. 2d (P & F) 1275 (1986). In any event, Mtel understands that NABER will seek interconnection rights equivalent to RCCs and eligibility for individuals later this year.

⁹ *Telocator Network of America v. FCC*, 761 F.2d 763 (D.C. Cir. 1985).

From a public policy perspective, NABER's petition brings into renewed question the entire regulatory dichotomy between PCPs and RCCs. If the proposal is adopted, RCCs and PCPs will be functionally identical competitors in the marketplace, yet face entirely different regulatory structures. And, the differences between RCC and PCP regulation impose significantly heavier burdens on RCCs:

- **State Regulation.** RCCs are subject to state entry and economic regulation. PCPs, as private land mobile licensees, are exempt from state oversight under Section 332 of the Communications Act.
- **Service Obligations.** RCCs are bound by tariffing restrictions and must provide service at rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Service from PCPs is governed only by contract, and PCPs are free to price services as they see fit, offer or deny service to any eligible users, and discriminate in the treatment of end users.
- **Ownership Restrictions.** RCCs are subject to alien ownership restrictions in the Communications Act. PCPs are free to seek foreign investment in new services.
- **Application Processing.** RCC applications generally take 5 months to process, and significantly longer if mutually exclusive applications are tendered. PCP applications, in contrast, are generally granted within 2 months. RCCs also pay higher application fees than PCPs, even taking into account NABER's coordination fees.
- **Forfeiture Assessments.** RCCs are subject to forfeiture baselines that are approximately 10 times higher than the comparable baselines for PCPs.

As NABER's petition would remove the last remaining functional distinction between PCPs and RCCs, a reexamination

of the purpose underlying each of these disparate burdens is warranted. If these regulatory disparities have a rationale that is justified by the differing rights of common carriers and private carriers, then increasing PCP rights should trigger additional PCP obligations. If, on the other hand, the regulations are unrelated to the status of the carrier, then these regulations do no more than impose barriers to full competition, in which case the regulations should no longer apply to common carriers.


Last, but not least, NABER's petition triggers several legal issues. Under Section 332 of the Communications Act, private land mobile services, including PCP operations, are exempted from state regulatory oversight, but common carrier services, like RCC operations, are not. Implicitly, Congress intended to codify a difference between private and common carrier land mobile services; i.e., Congress provided different regulations for functionally different carriers.¹⁰ If the last defining characteristic of common carriage is eliminated, Section 332 will be rendered a nullity.

¹⁰ The Conference Report accompanying Section 332, in this regard, states that "[t]he basic distinction set out in this legislation is a functional one; i.e., whether or not a particular entity is engaged functionally in the provision of ... facilities of a common carrier." H.R. No. 97-765, 97th Cong., 2nd Sess. 55, reprinted in 1982 U.S.S.C.A.N. 2261 (emphasis added). The same emphasis is noted within Section 153 itself, where Congress circularly defines a "private land mobile service" as a mobile service "for private one-way or two-way . . . communications. . ." 47 U.S.C. § 153 (emphasis added).

V. CONCLUSION

In view of the foregoing, NABER's petition does not offer a sound route to providing important protections for the PCP industry as a whole. In particular, its National System proposal would impair opportunities for many PCPs and create enormous potential for abuses. Instead of attempting to superimpose such exclusive frequency rights upon licensed services, the Commission should move quickly to allow use of 930 - 931 MHz for new regional and national PCP and RCC services.

Respectfully submitted,



Richard E. Wiley
R. Michael Senkowski
Eric W. DeSilva
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Dated: June 10, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 1992, I caused copies of the foregoing "Comments of Mobile Telecommunication Technologies Corporation in Opposition" to be mailed via first-class postage prepaid mail to the following:

Michael Cutler
APCP
1501 Duke Street, Suite 200
Alexandria, Virginia 22314

David Weisman
Alan Tilles
Meyer, Faller, Neisman and Rosenberg
4400 Jenifer Street, N. W.
Washington, D. C. 20015


Barbara Anne Litvak